

DWIGHT C. HOLTON
Acting United States Attorney
STEPHEN J. ODELL, OSB #90353
Assistant United States Attorney
District of Oregon
600 United States Courthouse
1000 S.W. Third Avenue
Portland, OR 97204-2902
(503) 727-1000

FILED 10 APR 21 11:48 USDC-ORP

IGNACIA S. MORENO
Assistant Attorney General
SETH M. BARSKY, Assistant Section Chief
COBY HOWELL, Trial Attorney
BRIDGET KENNEDY McNEIL, Trial Attorney
Wildlife & Marine Resources Section
U.S. Department of Justice
Environment & Natural Resources Division
c/o U.S. Attorney's Office
1000 SW Third Avenue
Portland, OR 97204-2902
(503) 727-1000
(503) 727-1117 (fx)

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, *et al.*

Defendants.

Civil No. 01-640-RE

**~~PROPOSED~~ ORDER
FOR 2010 SPRING
OPERATIONS**

Federal Defendants submit the following (Proposed) Order for 2010 spring fish operations for the Federal Columbia River Power System ("FCRPS").

In 2005, this Court granted in part, and denied in part, Plaintiffs' motion for preliminary injunctive relief seeking to alter FCRPS operations during the spring and summer of 2006. See Doc. 1221. The Court adopted the Federal Defendants' proposals for the amount and timing of spring and summer spill at FCRPS dams with two exceptions. Id. at 11. After commencement of spill, Federal Defendants were directed to provide the court with a monthly written report describing the implementation and progress of the spill program. Id.

Similar spring and summer operations were implemented in 2007 pursuant to an agreement between the Bonneville Power Administration (BPA), the Confederated Tribes of the Warm Springs Reservation, the Nez Perce Tribe, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes and Bands of the Yakama Nation, and Confederated Tribes of the Colville Indian Reservation. See Doc. 1347 at 3. On May 23, 2007, the Court adopted the 2007 operations agreement as an order of the Court. See Opinion and Order (May 23, 2007).

At a December 12, 2007 status conference, Federal Defendants offered to continue the 2007 spring and summer operations if Plaintiffs would agree to not seek a preliminary injunction until after issuance of the 2008 BiOp. In agreeing to work toward this goal, Plaintiffs' recognized that any agreement for 2008 operations "would essentially continue - subject to discussion of limited changes necessary to accommodate new structures and perform essential research - the court-ordered

operations from 2007.” See Plaintiffs’ January 11, 2008 Letter. The 2008 Fish Operations Plan, incorporated into the Court’s Order on 2008 Operation, recognized the operational adjustments necessary to perform this research and accommodate structural changes. See Doc. 1409, Attachment 1. On February 25, 2008, this Court entered the joint proposed order for 2008 spring and summer operations. Doc. 1423.

In a February 18, 2009 letter to counsel, the Court asked Federal Defendants to agree to “continue recent court-ordered spill operations for Spring 2009.” See Doc. 1682 at 2. At the March 6, 2009 hearing, counsel represented that Federal Defendants would abide by the Court’s request to continue court-ordered spring spill operations subject to modifications necessary to accommodate new structures and perform essential research. See Tr. at 167. On April 10, 2009, the Court entered an order adopting the parties proposed order. See Doc. 1694.

On February 19, 2010, the Court entered an order granting Federal Defendants’ request for a limited, voluntary remand and directed Federal Defendants to complete this remand within three months. In the interests of maintaining this three-month remand schedule, Federal Defendants have proposed the following order for 2010 spring fish operations.

THEREFORE, in light of this prior history and in the interests of avoiding further litigation, the undersigned parties stipulate as follows:

1. Scope: The Court’s entry of the proposed order on spring 2010 fish operations shall not be construed as a concession or preliminary assessment of the merits of any parties’ claim concerning the 2008 Biological Opinion, Adaptive

Implementation Management Plan (AMIP) or Action Agencies' Records of Decision as set forth in the parties' pending cross-motions for summary judgment.

2. Operations: FCRPS spring 2010 fish operations shall be conducted as set forth in the 2010 Spring Fish Operations Plan, ^{and Addendum} incorporated herein by reference. To the extent hydro-power operations are not specified in the 2010 Spring Fish Operations Plan, ^{and/or Addendum} Federal Defendants shall operate the FCRPS consistent with the 2008 Biological Opinion and/or other operative documents necessary to implement that Biological Opinion, unless otherwise specified herein.

3. Timing: This Order applies to spring spill operations for 2010 only and shall continue until the transition date from spring spill operations as set forth in the 2010 Spring Fish Operations Plan.

4. In-Season Adjustments: As set forth in the 2010 Spring Fish Operations Plan, ^{and Addendum} Federal Defendants will utilize the existing Regional Forum committees to make in-season adjustments.

5. Standard Reporting Requirement: Federal Defendants shall provide the court with a written report describing the implementation of the 2010 Spring Fish Operations Plan, beginning May 16, 2010, and monthly intervals thereafter until satisfaction of the earlier of the conditions in Paragraph 2. Should the agencies encounter a situation similar to that which occurred on April 3, 2007, which the Court characterized as "placing power needs before the needs of listed species", Federal Defendants shall notify the Court and the other parties promptly and shall propose mitigation measures, if any, that may be appropriate as soon as practicable.

6. Emergency Reporting Requirements: Federal Defendants shall take all reasonable and practicable steps to notify the Court and the parties prior to any declared system emergency. If unforeseen circumstances arise that preclude Federal Defendants from notifying the Court and the parties prior to a declared system emergency, they shall report those actions directly to the court as soon as practicable.

Dated this 21st day of April, 2010.


James A. Redden
United States District Judge

RESPECTFULLY SUBMITTED,

IGNACIA S. MORENO
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division
SETH M. BARSKY
Assistant Section Chief

/s/ Coby Howell
COBY HOWELL
Trial Attorney
BRIDGET KENNEDY McNEIL
Trial Attorney
Wildlife & Marine Resources Section
c/o U.S. Attorney's Office
1000 SW Third Avenue
Portland, OR 97204-2902
(503) 727-1000
(503) 727-1117 (fx)